Supreme Court, U.S.
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Nº. _____

In The
Supreme Court of the United States

ANTON DODAJ; GJYLANA DODAJ; FRANC DODAJ; KRISTJAN DODAJ,
Petitioners,

v.

JOHN ASHCROFT,
ATTORNEY GENERAL OF THE UNITED STATES;
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

* Marshal E. Hyman
MARSHAL E. HYMAN & ASSOCIATES
3250 W. Big Beaver
Suite 529
Troy, MI 48084

248-643-0642
Fax 643-0798

Attorney for Petitioners
**Counsel of Record*

March, 2005

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTION PRESENTED FOR REVIEW

Whether the 90-day deadline for filing a motion to reopen with the Board of Immigration Appeals was equitably tolled where Petitioners received ineffective assistance of counsel in that their former counsel failed to file a brief on appeal, resulting in summary dismissal, and then failed to notify Petitioners of an adverse decision, when Petitioners filed their motion to reopen immediately after investigating former counsel's errors.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Anton Dodaj, Gjylana Dodaj, Franc Dodaj, and Kristjan Dodaj respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on September 9, 2004 and December 7, 2004, respectively.

OPINIONS BELOW

The opinion of the Immigration Judge (App. F hereto) in unreported. The opinions of the Board of Immigration Appeals (App. C, D, and E hereto) are unreported. The opinion of the Sixth Circuit Court of Appeals on the merits (App. B hereto), of which review is sought, is unreported. The order of the Sixth Circuit denying the petition for panel rehearing and suggestion for rehearing en banc in such case (App. A hereto) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. B) was entered on September 9, 2004. A timely petition for rehearing was denied on December 7, 2004 (App. A). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in

conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the Board of Immigration Appeals that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

RELEVANT PROVISIONS INVOLVED

8 C.F.R. § 3.1(d)(2) (2001) provided, in relevant part:

> (2) Summary dismissal of appeals—
>
> (i) Standards. A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:
>
> ...
>
> (D) The party concerned indicates on Form EOIR-26 or Form EOIR-29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing;

8 C.F.R § 1003.1(d)(2)(iii) provides, in relevant part:

(iii) Disciplinary consequences. The filing by an attorney or representative accredited under § 1292.2(d) of this chapter of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

8 C.F.R. § 1003.2(c)(2) provides, in relevant part:

(2) ... Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

STATEMENT

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA"), and the Sixth Circuit Court of Appeals finding that the 90-day deadline for filing a motion to reopen with the BIA was not equitably tolled where Petitioners received ineffective assistance of counsel and Petitioners filed their motion to reopen immediately after investigating former counsel's errors. Petitioners' former attorney's inexcusable failure to file a brief resulted in summary dismissal of their appeal and the former counsel failed to inform Petitioners of the adverse decision in a timely manner.

(ii) Proceedings at the Immigration Court

Mr. Anton Dodaj, his wife Ms. Gjylana Dodaj, and their children Franc and Kristjan Dodaj[1], entered the United States without inspection on July 20, 1999. On the same day they entered the United States, the Immigration and Naturalization Service ("INS")[2] placed them in removal

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[1] As Ms. Gjylana Dodaj, Franc Dodaj, and Kristjan Dodaj are dependent upon Mr. Anton Dodaj's applications, this Petition refers to Mr. Dodaj unless specifically noted otherwise. See INA § 208(b)(3), 8 U.S.C. § 1158(b)(3).

[2] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various

proceedings in Immigration Court. The Immigration Judge ("IJ"), sitting in Detroit, Michigan, found Mr. Dodaj credible but denied his applications for asylum, withholding of removal, and protection under the Convention Against Torture. (App. F). Mr. Dodaj was represented by Mr. Patrick Salley.

(iii) Proceedings at the Board of Immigration Appeals

Mr. Salley, who continued to represent Mr. Dodaj before the BIA, indicated in his timely Notice of Appeal to the BIA that he would file a separate written brief. Mr. Salley, who requested, and received, an extension of the briefing deadline, failed to file a brief. The INS moved to dismiss the appeal based on the failure to file a brief, but Mr. Salley did not respond to the motion or attempt to file a brief.

On September 10, 2001, the BIA denied Mr. Dodaj's appeal. (App. E). The BIA's sole reason for denying the appeal was the failure to file a brief. The BIA did not reach the merits of Mr. Dodaj's appeal. Mr. Salley did not notify Mr. Dodaj of the decision until June 7, 2002.

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agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

On November 22, 2002, Mr. Dodaj, with new counsel, filed a motion to reopen with the BIA based on Mr. Salley's ineffective assistance of counsel. Mr. Dodaj complied with the procedural requirements for making this claim by filing a Request for Investigation ("RFI") with the State of Michigan's Attorney Grievance Commission ("AGC"), filing an affidavit providing the basis for his allegations, and notifying Mr. Salley of the charges. Based on these and similar charges, the AGC recommended that Mr. Salley be suspended from the practice of law for six months. Mr. Salley chose to resign from the practice of law.

On January 23, 2003, the BIA denied this motion, citing Mr. Dodaj's delay from when he learned of the decision to when he filed the motion to reopen. (App. D). Mr. Dodaj filed a timely motion for reconsideration with the BIA and a timely petition for review with the Sixth Circuit.

The BIA denied the motion for reconsideration on October 23, 2003. (App. C). In its decision, the BIA acknowledged that ineffective assistance of counsel can toll the 90-day motion to reopen deadline but held that Mr. Dodaj did not exercise due diligence in filing his motion to reopen.

(iv) Statement of Facts

Mr. Anton Dodaj, age 46, Ms. Gjylana Dodaj, age 38, Mr. Franc Dodaj, age 19, and Mr. Kristjan Dodaj, age 13, are natives and citizens of Albania. They entered the United States without inspection on July 20, 1999 and applied for asylum on the same day. They offered credible testimony and evidence in support of their application at their merits hearing before the Immigration Judge.

Mr. Dodaj and his family have been long-standing, active supporters of democracy and opponents of the communist and socialist government. The communist government executed his grandfather in 1954 and imprisoned his father from 1979 until 1987. Mr. Dodaj belonged to the society of the formerly-politically persecuted.

Given his family's treatment by the communist government, Mr. Dodaj eagerly joined the burgeoning democracy movement on January 11, 1989. He was active in the early movement, taking part in a demonstration in Shkoder, Albania. The police arrested many demonstrators, including Mr. Dodaj, after they took down a bust of Stalin. During his three week detention, the police tortured him by making him stand outside during the frigid January nights

and pouring cold water on him while threatening to execute him.

Undeterred, he took part in a second demonstration on October 13, 1990. The police again attacked the demonstrators, this time after they took down a bust of the communist leader Enver Hoxha. The police struck Mr. Dodaj in the head, knocking him unconscious.

Mr. Dodaj participated in the April 2, 1991 demonstration protesting the Communist Party's manipulation of the country's elections. Mr. Dodaj helped transport injured demonstrators to hospitals. The police killed four demonstrators.

The Democratic Party won the 1991 elections. Mr. Dodaj, enjoying a brief period of peace and freedom, bought a bakery in 1993. This peace proved short-lived when, in March of 1997, the socialists aided and encouraged many criminals, including former Communist Party members, to break out of jail and destroy the institutions of the democratic government. These criminals burned down Mr. Dodaj's bakery. Mr. Dodaj could not protect his bakery because he was answering the Democratic Party's call to defend the city.

Following this chaos, the Socialist Party won Albania's 1997 elections and hired many of these criminals

to serve in the police force. Mr. Dodaj and other Democratic Party supporters protested against the fraud that took place in those elections. Twice, the police arrested and beat him for participating in these protests. They harassed him at home and work in an effort to intimidate him.

In May 1998, Mr. Dodaj and the chief of police engaged in a political debate. Afterwards, police officers detained him for two days and beat him.

On September 14 1998, Mr. Dodaj attended the funeral for the assassinated Democratic Party leader Azem Hajdari. The police set up many checkpoints on the road from the funeral in the capital city, Tirana, to Shkoder. At one of these checkpoints, the police stopped Mr. Dodaj, ordered him out of the car, and punched him.

On March 25, 1999, Mr. Dodaj challenged the local Socialist Party Chairman, Dashamir Dini, after the latter's statements to children that the Socialist Party was going to kill its opponents. Mr. Dini pushed Mr. Dodaj and threatened to "teach him a lesson." Several hours later, the police arrested Mr. Dodaj in his house and detained him for 12 days. During this time, they beat him to the point where he thought his ribs were broken.

After his release, Mr. Dodaj went to talk to Mr. Dini again. Mr. Dodaj threatened to speak to the media about what happened to him. In April of 1999, someone set off an explosion outside the door to his apartment. His apartment was the only one out of 15 in the building that was targeted. After this happened, he arranged to leave Albania.

Mr. Dodaj did not discover that his prior counsel, Mr. Salley, failed to file a brief to the BIA and that the BIA accordingly dismissed his appeal until June 7, 2002, almost nine months after the decision. On July 29, 2002, he requested a copy of his Immigration Court and BIA files by filing a Freedom of Information Act ("FOIA") request, which is the only way to obtain these copies. He did not receive a copy of his file until October 5, 2002. Only then was he able to review Mr. Salley's performance and file a Request for Investigation with the State Bar of Michigan. Since then, Mr. Salley has agreed to cease practicing law, following complaints made by Mr. Dodaj and his other immigration clients.

(v) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction in the Sixth Circuit Court of Appeals was proper. INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)

(B)(ii). Venue was proper in the Sixth Circuit because an IJ sitting in Detroit, Michigan completed the Immigration Court proceedings. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the BIA that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

I. Due diligence required Petitioners to first investigate the wrongdoings of their previous attorney before filing a motion to reopen with the BIA.

Aliens have a Fifth Amendment due process right to effective assistance of counsel in removal proceedings. Scorteanu v. INS, 339 F.3d 407, 413 (6th Cir. 2003); Matter of Assaad, 23 I. & N. Dec. 553, 558 (BIA 2003). The BIA acknowledges "that despite having no right to appointed counsel in an immigration hearing, a respondent has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents respondent from meaningfully presenting his or her case." Assaad, 23 I. & N. Dec. at 558; see also Denko v. INS, 351 F.3d 717, 723-24 (6th Cir. 2003).[3]

Recognizing that ineffective assistance of counsel could make it impossible for an alien to comply with filing

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[3] At least six other circuits have also recognized this due process right. See Dakane v. Attorney General, 371 F.3d 771, 774-75 (11th Cir. 2004); Singh v. Ashcroft, 367 F.3d 1182, 1186 (9th Cir. 2004); Betouche v. Ashcroft, 357 F.3d 147, 149 (1st Cir. 2004); Uspango v. Ashcroft, 289 F.3d 226, 231 (3rd Cir. 2002); Iavorski v. INS, 232 F.3d 124, 128-29 (2d Cir. 2000); Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990).

deadlines, the BIA will equitably toll these deadlines when an "attorney engaged in fraudulent activity causing an essential action in her client's case to be undertaken ineffectively, out of time, or not at all." Iturribarria v. INS, 321 F.3d 889, 898 (9th Cir. 2003); see also Iavorski v. INS, 232 F.3d 124, 133 (2d Cir. 2000); Riley v. INS, 310 F.3d 1253, 1258 (10th Cir. 2002). "It is hornbook law that limitations periods are 'customarily subject to 'equitable tolling.'" Young v. U.S., 535 U.S. 43, 49, 122 S. Ct. 1036, 1040, 152 L. Ed. 2d 79 (2002) (internal citations omitted). In the instant case, the BIA held that the 90-day deadline for filing a motion to reopen would be tolled if Mr. Dodaj demonstrated due diligence in discovering the ineffective assistance and in seeking to correct it. (App. C).

To deter meritless claims of ineffective assistance of counsel, the BIA requires that aliens making these claims follow strict procedural rules. Sswajje v. Ashcroft, 350 F.3d 528, 533 (6th Cir. 2003). The alien must file a complaint with the state bar association, provide an affidavit detailing the claim of ineffective assistance, and provide the grieved attorney with an opportunity to respond. Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA 1988).

Mr. Dodaj satisfied the procedural requirements. First, he filed an affidavit describing his ineffective assistance of counsel claim. Second, he notified Mr. Salley of the charges against him and gave him an opportunity to respond. Third, he filed a RFI with the AGC against Mr. Salley.

A. Petitioners Received Ineffective Assistance of Counsel

Petitioners clearly received ineffective assistance of counsel. The BIA dismissed their appeal, not on the merits, but solely because Mr. Salley inexcusably failed to file a brief. Based on the charges made by Mr. Dodaj and other aliens, the AGC recommended that Mr. Salley be suspended from the practice of law for six months. The BIA suspended him from practicing before the BIA and Immigration Courts. Mr. Salley has resigned from the practice of law.

Mr. Salley provided ineffective assistance of counsel at two critical points in the administrative proceedings. First, he failed to file a brief on appeal, despite receiving an extension of the briefing deadline and receiving the INS's motion to dismiss for failure to file a brief. Second, he failed to notify Mr. Dodaj of the BIA's

decision for almost nine months, despite Mr. Dodaj's efforts to contact him.

The BIA will summarily dismiss an appeal when a party fails to file a brief after indicating that it would file one. 8 C.F.R. § 3.1(d)(2)(i)(D).[4] Mr. Salley indicated on the Notice of Appeal form that he would file a separate brief. This form indicated that an "appeal may be summarily dismissed if you indicate in Item #6 that you will file a separated written brief or statement and, within the time set for filing, you fail to file the brief or statement and do not reasonably explain such failure." The INS even moved for summary dismissal based on the failure to file a brief. The failure to file a brief is "frivolous behavior" that can result in disciplinary sanctions. 8 C.F.R. § 1003.1(d)(2)(iii) (2002).

Mr. Salley compounded his error by waiting nine months to notify Mr. Dodaj that the Board dismissed his appeal. Had Mr. Salley timely notified Mr. Dodaj, he could

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[4] 8 C.F.R. § 3.1(d)(2)(i)(D) (2001) permitted the BIA to summarily dismiss an appeal if the "party concerned indicates on Form EOIR-26 or Form EOIR-29 [the Notice of Appeal forms] that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such a brief or statement, or reasonably explain his or her failure to do so, within the time set for filing."

have moved the BIA to reopen or reconsider his case or sought review on the merits with the Court.

Michigan Rules of Professional Conduct require that a "lawyer shall act with reasonable diligence and promptness in representing a client." M.R.P.C. 1.3. A "lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains." M.R.P.C. 1.4(a). There was nothing reasonable or prompt about Mr. Salley's nine-month delay in notifying Mr. Dodaj that the Board ordered him removed from the United States. Mr. Salley violated his duty to keep Mr. Dodaj informed about the status of his case and to respond to Mr. Dodaj's inquiries.

B. The Failure of Petitioners' Previous Attorney to File a Brief on Appeal Prejudiced Petitioners

Mr. Salley's failure to file a brief to the BIA prejudiced Mr. Dodaj because the BIA dismissed his appeal without considering the merits of his asylum application. The failure to file a brief on appeal, when it results in summary dismissal of the appeal, is presumptively prejudicial. An alien is prejudiced "when the performance

of counsel is so inadequate that it may have affected the outcome of the proceedings." Dakane, 371 F.3d at 775. "Where counsel fails to file any appeals brief in the context of an immigration proceeding, effectively depriving an alien of an appellate proceeding entirely, there is a rebuttable presumption of prejudice." Id. Mr. Salley's errors rendered "the adversary process itself ... presumptively unreliable." Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985 (2000) (internal citations omitted).

In Singh, as in this case, the BIA dismissed an alien's appeal because the attorney failed to file a brief. Singh, 367 F.3d at 1186-87. Because the BIA summarily dismissed the appeal on that basis, and not on the merits of the case, "counsel's failure to file a timely brief deprived Singh of any meaningful review of the IJ's decision. A presumption of prejudice is thus warranted here." Id. at 1189. To require an alien in this situation to prove that he would have won his case places too high a burden on the alien. Id. The alien only has to show "that the BIA could *plausibly* have determined" he was eligible for asylum. Id.

Had the BIA permitted Mr. Dodaj to argue the merits of his appeal, he could have shown that his credible testimony and evidence demonstrated that he suffered past

persecution and continued to have a well-founded fear of returning to Albania. As set forth above, Mr. Dodaj and his family have been persecuted by the Communist and Socialist parties for their pro-democracy beliefs and activities. Mr. Dodaj was arrested and beaten on numerous occasions because he took part in anti-communist and pro-Democratic Party demonstrations.

Mr. Salley's actions left the Petitioners subject to final orders of removal. Because he delayed notifying them of the decision, they have accumulated more than one year of unlawful presence. If they are removed, they cannot return to the United States for ten years. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II). They are ineligible for a waiver of this bar because they do not have a United States citizen or lawful permanent resident spouse or parent. INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182 (a)(9)(B)(v).

C. Due Diligence Required Petitioners to First Investigate their Previous Attorney's Performance Before Filing a Grievance and a Motion to Reopen Based on Ineffective Assistance of Counsel

The primary issue in this case is whether Mr. Dodaj exercised due diligence. The BIA and the Sixth Circuit concluded that he did not exercise due diligence because he did not file the motion to reopen until five and one-half months after learning of the BIA's decision. (App. A, C). During that time, Mr. Dodaj was actively investigating his case. The delay is attributable in large to the nearly four months it took the government to provide Mr. Dodaj's new counsel with a copy of his file. Without his file, Mr. Dodaj could not determine if there was any merit to his ineffective assistance of counsel claim because he could not identify what, if any, errors Mr. Salley made. The agency and lower court decisions in this case effectively force aliens to file bar complaints and motions to reopen without first investigating the merits of their claim, something that is contrary to the purpose of Lozada's procedural requirements.

"Diligence" requires that a person claiming that an error was committed first investigate the claim. Williams v. Taylor, 529 U.S. 420, 435, 120 S. Ct. 1479, 1490, 146 L.

Ed. 2d 435 (2000) (addressing the diligence requirement in 28 U.S.C. § 2254(e)(2) in the context of petitions for writ of habeas corpus). When the evidence necessary for an investigation is in the hands of the government or is concealed by a third party, then an individual cannot be expected to conduct a "reasonable and diligent investigation." See Stickler v. Greene, 527 U.S. 263, 287-88, 119 S. Ct. 1936, 1951-52, 144 L. Ed. 2d 286 (1999).

Unlike most courts, the BIA does not make files readily available for viewing or copying. Instead, the agency requires aliens to file FOIA requests to obtain copies of their files. Mr. Dodaj's new counsel immediately filed FOIA requests but did not receive a copy of the file until October 5, 2002. It was only upon reviewing the entire agency record that Mr. Dodaj realized the true extent of Mr. Salley's errors, including the failure to file a brief or timely file a witness and exhibit list with the IJ.

If Mr. Dodaj filed the motion to reopen immediately upon learning of the BIA's dismissal, it would have contravened the purpose of the Lozada procedural requirements and risked a premature denial by the BIA. Lozada "not only serves to deter meritless claims of ineffective representation but also highlights the standard which should be expected of attorneys who represent

person in immigration proceedings, the outcome of which may, and often does, have enormous significance for the person." Sswajje, 350 F.3d at 533; see also Lozada, 19 I. & N. Dec. at 639-40.

If he filed a motion to reopen with the BIA but did not include proof that he filed a complaint against Mr. Salley, he risked a dismissal on procedural grounds. "The fact that a grievance *will be* filed, without more, does not satisfy *Lozada's* requirement that a complaint be filed *before* the affidavit is submitted to the BIA." Hamid v. Ashcroft, 336 F.3d 465, 469 (6th Cir. 2003) (emphasis in original). The BIA must determine if a complaint has been filed when an alien makes an ineffective assistance of counsel claim. Lozada, 19 I. & N. Dec. at 639.

With few exceptions, aliens can file only one motion to reopen. 8 C.F.R. § 1003.2(c)(2). The rulings below would have Mr. Dodaj risk wasting his one motion to reopen by filing an incomplete motion before he could investigate the merits of his claim. Filing a motion to reopen alleging ineffective assistance of counsel before investigating the claim, identifying the actual incidents of ineffective assistance, and satisfying the BIA's procedural requirements, risks dismissal for those reasons alone, is

extremely prejudicial to Petitioners, and could itself be ineffective assistance of counsel.

The 90-day motion to reopen clock begins when an alien and his attorney review the alien's file to identify the error's made by a previous attorney. Iturribarria, 321 F.3d at 898-99. On October 11, 2000, Iturribarria's first attorney mailed him a letter informing him that the BIA denied his appeal on October 5, 2000. Id. at 893. His new counsel received his file from the first attorney on October 19, 2000. Id. On November 1, 2000, Iturribarria met with his new attorney to discuss the contents of that file. Id. at 898. The BIA rejected his January 11, 2001 motion to reopen as untimely. Id. at 898-99. The Ninth Circuit reversed because the 90-day clock began on November 1, 2000 when Iturribarria discussed his file with his new attorney, not when the BIA denied the appeal, or when he first learned of the BIA decision, or when his new attorney received a copy of the file. Id. Under the rules of equitable tolling, the alien's motion was timely filed. Id.

Petitioners exercised due diligence in filing their motion to reopen. They could not, in good faith, file a complaint against Mr. Salley without first investigating his actions to determine what, if any, errors he made. To comply with the BIA's own procedural rules, they had to

delay filing the motion to reopen until the BIA provided them with a copy of their file.

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

- Petitioners exercised due diligence in investigating the errors made by previous counsel.
- Petitioners' motion to reopen was subject to equitable tolling and, thus, was timely filed.
- The deadline for filing their motion to reopen was equitably tolled until Petitioners received a copy of their file from the government.
- Petitioners were prejudiced and deprived of a full and fair hearing on their application for asylum when prior counsel's inexcusable failure to file a brief resulted in the summary dismissal of their appeal.

Therefore, Petitioners respectfully pray that the Court grant their petition for writ of certiorari, reverse the decisions of the Sixth Circuit Court of Appeals and the BIA, and reopen their removal proceedings to permit them to file a brief in support of their appeal to the BIA.

Respectfully Submitted,

Marshal E. Hyman

Counsel of Record

Russell Reid Abrutyn

APPENDIX

6TH CIRCUIT FILINGS:

Order Denying Petition for Rehearing
and Petition for Rehearing En Banc,
filed 12/07/04 ..... A1 - A1

Petition for Review of an Order of
the Board of Immigration Appeals,
filed 09/09/04 ..... B1- B10

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

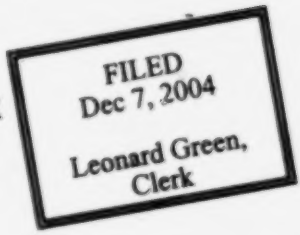
ORDER, DENYING PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC,
FILED DECEMBER 7, 2004

A-1 through A-1

Nos. 03-3267/4497
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTON DODAJ, ET AL.,)
Petitioners,)
)
v.)
JOHN ASHCROFT,)
ATTORNEY GENERAL)
THE UNITED STATES,)
Respondents.)

ORDER



BEFORE: **NELSON, SILER**, and **BATCHELDER**, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is **denied**.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

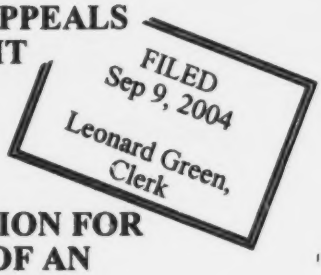
APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS
FILED SEPTEMBER 9, 2004

B-1 through B-10

Nos. 03-3287,03-4497
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



ANTON DODAJ, ET AL., *Petitioners,*	)
	) **ON PETITION FOR**
v.	) **REVIEW OF AN**
JOHN ASHCROFT,	) **ORDER OF THE**
ATTORNEY GENERAL	) **BOARD OF**
THE UNITED STATES,	) **IMMIGRATION**
Respondents.	) **APPEALS**

Before: **NELSON, SILER**, and **BATCHELDER**, Circuit Judges.

DAVID A. NELSON, Circuit Judge. This matter comes before us on a petition for review of an order in which the Board of Immigration Appeals declined to reopen certain administrative appellate proceedings. The motion to reopen was flied late, but the petitioner contends that the lateness in filing must be excused because of his lawyer's delay in informing him that his administrative appeal had been dismissed.

Whether or not the filing deadline should be deemed to have been tolled for a period of time, we conclude that the Board was not required to extend any tolling beyond the point

necessary to accommodate a litigant prepared to move as expeditiously as possible. On the facts presented here, where the petitioner clearly could have moved more expeditiously, we are not persuaded that the Board abused its discretion in denying the motion to reopen. The petition for review will be denied.

I

The petitioner, Anton Dodaj, is a native of Albania and a citizen of that country, as are his wife and their two sons. The Dodajes entered the United States without inspection in 1999, and removal proceedings followed. Conceding removability. Mr. Dodaj applied for asylum on behalf of himself and his family. He also sought withholding of removal and relief under the Convention Against Torture. An immigration judge denied the application in October of 2000.

Mr. Dodaj appealed to the Board, indicating on the notice of appeal that he intended to file a brief in support of his position. Although an extension of the briefing deadline was granted, Mr. Dodaj's lawyer never filed a brief. The

Board summarily dismissed the appeal as a result. See 8 C.F.R. § 1003.1 (d)(2)(i)(E), which authorizes the Board to dismiss an appeal summarily if a party fails to file a brief after indicating on the appropriate form that he will do so.

It was September 10, 2001, when the appeal was dismissed. Mr. Dodaj's attorney did not inform his client of the dismissal until June 7, 2002, almost nine months later. Mr. Dodaj hired a new lawyer within a few weeks, and the lawyer promptly requested copies of all relevant files under the Freedom of Information Act ("FOIA"). The records were provided on October 5, 2002. On October 21, 2002, Mr. Dodaj filed a complaint against his former lawyer with Michigan's Attorney Grievance Commission. A month later, on November 22, 2002, Dodaj filed his motion to reopen proceedings before the Board on the basis of ineffective assistance of counsel.

The Board denied the motion on the ground that it had not been filed within 90 days of the dismissal of Mr. Dodaj's appeal, that being the limitations period prescribed by a regulation then codified at 8 CFR § 3.2(c)(2). *Cf.* 8 U.S.C. §

1229a(c)(6)(C). Concluding that Mr. Dodaj had not demonstrated the exercise of due diligence after he learned of the dismissal, the Board declined to apply the doctrine of equitable tolling. Mr. Dodaj filed a timely petition for review.[1]

II

We must first decide whether this court has jurisdiction to review the Board's denial of the motion to reopen. The government, relying on 8 U.S.C. § 1252(a)(2)(B)(ii), contends that jurisdiction is lacking. We disagree.

Section 1252(a)(2)(B)(ii) of Title 8 provides that

> "no court shall have jurisdiction to review,... any... decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of [asylum]."

---

[1]Mr. Dodaj also moved for reconsideration of the Board's decision. The Board denied the motion, and Mr. Dodaj filed a timely petition for review of the denial. The second petition for review was consolidated with the first and has been submitted on the same briefs and oral argument. Unless the context indicates otherwise, references in this opinion to a singular petition for review should be understood to embrace both petitions.

The subchapter in question is Subchapter II of Chapter 12 of Title 8 of the United States Code. Whether we have jurisdiction depends, therefore, on whether Subchapter II of Chapter 12 of Title 8 "specifie[s]" that the granting or denial of a motion to reopen is committed to the Attorney General's discretion. See *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004) ("[T]he jurisdictional bar in § 1252(a)(2)(B)(ii) applies only to acts over which a statute gives the Attorney General pure discretion....").

Before 1996 "there was no statutory provision for reopening of a deportation proceeding, and the authority for such motions derived solely from regulations promulgated by the Attorney General." *Id.* (internal quotation marks and brackets omitted). "The Attorney General ha[d] 'broad discretion' to grant or deny" motions to reopen under this regulatory regime. *INS v. Doherty*, 502 U.S. 314, 323 (1992).

The procedure for reopening removal proceedings was prescribed by statute in 1996, with the enactment in that year of 8 U.S.C. § 1229a(c)(6). But section 1229a(c)(6) speaks only to the content and timing of motions to reopen; it

conspicuously fails to specify that the Attorney General's authority over such motions is discretionary. See *Medina-Morales*, 371 F.3d at 528.

It may well be that Congress left discretion to the Attorney General by default, given that the statute prescribes no standards for the granting of motions to reopen. "[D]efault authority," however, "does not constitute the *specification* required by § 1252(a)(2)(B)(ii)." *Id.* As the Ninth Circuit has said,

> "[w]e cannot ignore that Congress... expressly referred to 'authority... specified under this subchapter to be in the discretion of the Attorney General' at the same time it enacted a first-time provision addressing motions to reopen (§ 1229a(c)), but said nothing about the Attorney General's discretionary authority over such motions." *Id* at 528-29.

Like the Ninth Circuit, we are unwilling to treat as "specified" that which is manifestly unspecified. In light of the plain language of § 1252(a)(2)(B)(ii), we conclude that the statute does not bar judicial review of Mr. Dodaj's motion to reopen.

III

Under normal circumstances, at least, Mr. Dodaj's motion to reopen should have been filed within 90 days of September 10, 2001, the day the Board dismissed the appeal for failure to file a brief. But the motion was not filed until November 22,2002 - over 11 months late - and the question the Board faced was whether the late filing should have been excused because of the lawyer's nine-month delay in informing Mr. Dodaj of the dismissal.

Several courts of appeals have held that the 90-day time limit for filing a motion to reopen may be equitably tolled "during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). Mr. Dodaj contends that his attorney's failure, for nine months, to tell him his appeal had been dismissed prevented him from filing a timely motion to reopen.

Whether the doctrine of equitable tolling can ever apply in the context of motions to reopen removal proceedings appears to be an open question in this circuit. We need not resolve the question here, because if the time to file a motion to reopen did not begin to run until June of 2002, when Mr. Dodaj finally learned of the dismissal of his appeal, or even July of 2002, when he engaged a new lawyer, the motion to reopen could still be deemed untimely.

Mr. Dodaj contends that he could not file a motion to reopen within 90 days of June or July, 2002, because it took longer than 90 days to prepare a proper motion. In Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA 1988), the Board held that a motion alleging ineffective assistance of counsel must be supported by (1) an affidavit detailing the alien's agreement with his attorney, (2) proof that the alien has informed the attorney of his allegations and that the attorney has had an opportunity to respond, and (3) a statement as to whether a complaint has been filed with the appropriate disciplinary authority. Mr. Dodaj maintains that he could not know what errors his original lawyer had made, and thus could not satisfy

the second and third requirements of *Lozada*, until there had been a thorough review of the records obtained through FOIA on October 5,2002.

We are not persuaded. Regardless of whether the original lawyer made errors that could only have been discovered by reviewing the government's files, the critical error for purposes of the motion to reopen was known to Dodaj without the benefit of a FOIA request. On June 7, 2002, upon receiving a copy of the Board's order dismissing his appeal, Mr. Dodaj knew that his lawyer had failed to file a brief. He also knew that the failure to file a brief was the sole reason that the appeal had been dismissed In these circumstances, it seems to us, Mr. Dodaj could have sent his original lawyer a letter demanding an explanation, could have contacted the Attorney Grievance Commission if no answer were forthcoming, and could have described the situation in an affidavit annexed to a motion filed within 90 days.

The desire of the new lawyer to prepare his case as thoroughly as possible was commendable, no doubt, but deadlines are a fact of life that one ignores at his peril. The

Board might well have been more liberal than it was in applying the 90-day rule, but the standard that governs our review of denials of motions to reopen is "abuse of discretion." See *Doherty*, 502 U.S. at 323. On the record before us here, we cannot say that the Board abused its discretion in denying the motion to reopen Mr. Dodaj's appeal.

The petition for review is **DENIED.**

APPENDIX C

BOARD OF IMMIGRATIONS APPEALS

DECISION OF THE BOARD
OF IMMIGRATION APPEALS
FILED OCTOBER 23, 2003

C-1 through C-2

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration
Appeals

Falls Church, Virginia 22041

File: A77-800-901 - DETROIT Date: Oct. 23, 2003

In re: DODAJ, ANTON

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Hyman, Marshal E., Esquire

ON BEHALF OF DHS:
Shoudy, Rasario S., Assistant District Counsel

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 10012 to reconsider our decision dated January 30, 2003. The respondent requests that we reconsider our decision dated January 30, 2003. In that decision we denied the respondent's motion to reopen as untimely and declined to accept the respondent's late-filed motion after finding that he failed to exercise due diligence. In the motion to reconsider, the respondent argues that be did exercise due

diligence by filing his motion within 6 months of learning that the Board dismissed his appeal, because it took that long to find a new attorney, investigate his case, and comply with the requirements for an ineffective assistance of counsel claim. While the period for filing the motion can properly be tolled due to the ineffective assistance of counsel, the respondent is then expected to file the motion within the specified period for motions to reopen after learning about the Board's decision. See *Socop- Gonzalez v. INS*, 272 F.3d 1176, 1196 (9th cir. 2001). Therefore, we find no error in declining to accept the respondent's motion which was filed more than 90 days after learning of our previous order dismissing his appeal. Accordingly, the motion is denied.

/s/ Edward P. Grant
FOR THE BOARD

APPENDIX D

BOARD OF IMMIGRATION APPEALS

DECISION OF THE BOARD OF IMMIGRATION APPEALS FILED JANUARY 20, 2003

D-1 through D-4

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration
Appeals

Falls Church, Virginia 22041

File: A77-800-901 - DETROIT
A77-800-902
A77-800-903
A77-800-904

Date: Jan. 30, 2003

In re: ANTON DODAJ
GJYLANA DODAJ
FRANC DODAJ
KRISTJAN DODAJ

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Hyman, Marshal E., Esquire

APPLICATION: Reopening

ORDER:

PER CURIAM. The respondents have requested reopening of proceedings before the Board of Immigration Appeals. We have jurisdiction over this matter pursuant to 8 C.F.R. § 3.2. The motion is denied.

The record reflects that the respondents's appeal was summarily dismissed by the Board on September 10, 2001. On December 18, 2002, the respondents filed this instant motion to reopen. Section 3.2(c)(2) of 8 Code of Federal Regulations provides that "except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen proceedings (whether before the Board or the Immigration Judge) and that motion must be filed not later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or before September 30, 1996, whichever is later."

The record reflects that the instant motion to reopen was filed with the Board more than 90 days after the date in which the final administrative decision by the Board was rendered. It is therefore untimely. *See* 8 C.F.R. § 3 .2(c)(2). We have also determined that the exceptions to these filing requirements set forth in 8 C.F.R, § 3.2(c)(3) are inapplicable.

The respondents argued on appeal that they were the victims of ineffective assistance of counsel, and the 90-day period for reopening should be tolled. The doctrine of

"equitable tolling" has been recognized by various circuits. For instance, in *Iavorski v. INS*, 232 F.3d 124 (2nd Cir. 2000), the court held that an alien must demonstrate not only that the alien's constitutional right to due process has been violated by the conduct of counsel, but that the alien has exercised due diligence in pursuing the case during the period the alien seeks to toll. *Id.* In that case, the court concluded that the alien failed to demonstrate such diligence, and concluded that equitable tolling did not apply. *Id. See also Beffa v. Bank of West*, 152 F.3d 1174, 1176-77 (9th Cir. I 998)("[f]ederal courts apply the doctrine of equitable tolling only sparingly, especially in cases in which plaintiffs fail to exercise due diligence").

In the instant case, the respondents did not file their motion to reopen until 6 months had elapsed since learning of the Board's decision. Even taking into account the time required investigate their immigration status and obtain a new attorney, it appears that they did not exercise due diligence in pursuing their motion. We therefore refrain from excusing the

respondents from the 90-day deadline for filing a motion to reopen.

Accordingly, the motion is denied.

/s/ Edward P. Grant
FOR THE BOARD

APPENDIX E

BOARD OF IMMIGRATION APPEALS

DECISION OF THE BOARD OF IMMIGRATION APPEALS FILED SEPTEMBER 10, 2001

E-1 through E-2

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration
Appeals

Falls Church, Virginia 22041

File: A77-800-901 - DETROIT
A77-800-902
A77-800-903
A77-800-904

Date: Sep. 10, 2001

In re: ANTON DODAJ
GJYLANA DODAJ
FRANC DODAJ
KRISTJAN DODAJ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Patrick P. Salley, Esquire

ON BEHALF OF SERVICE:
Rosario S. Shoudy
Assistant District Counsel

ORDER:

PER CURIAM. The appeal is dismissed. The respondents, represented by counsel, checked he box on the Notice of Appeal (Form EOIR-26) to state that a separate written brief or statement would be filed. The record reflects that the respondents were granted until May 14, 2001, to

submit a brief or statement in support of the respondents' appeal. Upon written request. the respondents were granted an additional extension to file such brief or statement with a new due date of June 4, 2001. However, the record does not contain a separate written brief or statement, and the respondents have not offered an explanation as to the failure to timely submit the promised brief or statement. We thus find that summary dismissal is appropriate pursuant to the provisions of 8 C.F.R. § 3.1(d)(2)(i)(D) in this case.

/s/ Lauren R. Mathon
FOR THE BOARD

APPENDIX F

BOARD OF IMMIGRATION APPEALS

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE, FILED OCTOBER 3, 2000

F-1 through F-16

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Detroit, Michigan

File No. A 77 800 901
A 77 800 902
A 77 800 903
A 77 800 904

October 3, 2000

In the Matters of

ANTON DODAJ,
GJYILANA DODAJ,
FRANC DODAJ,
KRISTJAN DODAJ,
Respondents

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a) (6) (A) (i) of the Immigration & Nationality Act, as amended (Act)

APPLICATIONS: Section 208 - asylum; Section 241(b) (3) - Withholding of removal to Albania; and under Convention Against Torture (8 C-F.R. Section 208.16(c), incorporating Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment)

ON BEHALF OF RESPONDENTS:

Patrick P. Salley, Esquire
Law Off ices of Salley
& Salley, PLLC
660 Plaza Drive, Suite 2315
Detroit, Michigan 48226-1207

ON BEHALF OF SERVICE:

Rosario Shoudy, Esquire
Assistant District Counsel
Immigration & Naturalization Service
Detroit, Michigan

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Respondents are a 41-year-old married man (lead), his 34-year-old wife (A 77-800-902) and their two sons, ages 14 (A 77-800-903) and 8 (A 77-800-904) years old. All are natives and citizens of Albania who entered the United States on or about July 20, 1999 without being admitted or paroled after inspection by an Immigration officer. Consequently, on July 20, 1999, the same day of entry, the Immigration and Naturalization Service (Service) served respondents with Notices to Appear (NTAs) charging each with removal under Section 212 (a) (6) (A) (i) of the Immigration & Nationality Act, as amended, (Act). The charging documents were filed with the Court on August 18, 1999. Exhibit 1. Respondents through counsel admitted the allegations and conceded the charges of removal. Based on respondents admissions, the Court finds the charges of removal are established by clear

and convincing evidence. Respondents declined to designate a country for removal and, thus, the Court directed Albania as the country for removal. In lieu of removal respondents requested the relief of asylum (Section 208), withholding of removal to Albania (Section 241(b) (3)), and withholding of removal under Convention Against Torture (8 C.F.R. Section 2Q8.16(c)). Because respondents were served on the same day that they entered the United States, they are ineligible for voluntary departure under Section 240B(b).

The lead respondent filed with the Court an I-589 application which contained the other respondents. Prior to entering the I-589 application into the record, respondent, with the assistance of counsel, reviewed it making any necessary changes and thereafter signed it under oath affirming the truthfulness of its contents including any changes made thereon, Exhibit 2. Also entered in the record was a group exhibit from the Service consisting of country conditions as contained in the U.S. Department of State Country Reports on Human Rights practices for 1999 and for 1997. Also the Department of State Profile of Asylum Claims

and Country Conditions for Albania for November 1998, 1997 and 1996, Exhibit 3. Also part of the record is the advisory opinion from the Department of State sent in response to the Court's request for comment by the Department of State on respondent's I-589, Exhibit 4.

Under the applicable law an alien seeking a discretionary grant of asylum must establish that his is a "refugee" within the meaning of Section 101(a) (42) (A) of the Act which requires that he demonstrate an unwillingness or an inability to return to his country because of persecution or a "well-founded fear of persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion. To establish a well-founded fear, the alien must show a reasonable possibility of suffering such persecution if he were to return to his country of nationality or of last habitual residence based on his own past persecution or his identity and inclusion in a group against which there is a pattern and practice of persecution. Harm arising if from general civil strife does not amount to persecution within the meaning of the Act. *Matter of T-*, 20 I&N Dec. 751 at 758

(BIA 1992). Aliens fleeing general conditions of violence and upheaval in their countries do not qualify of asylum. *See e.g, Mendez-Efrain v. INS*, 813 F.2d 279 (9th Cir. 1987). In enacting Section 208(a) of the Act, Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbance conditions that necessarily have political implications. *See Campos-Guardado INS*, 809 F.2d 285 (5th Cir. 1987), *cert. denied*, 484 13.5. 826 (1987). While persecutory conduct may have more than one motive and so long as one motive falls within the statutorily enumerated grounds, the requirement is satisfied. However, an applicant still must produce evidence, either direct or circumstantial from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground. *In re S-P-*, Int. Dec. 3287 (BIA 1996). Also, where there's general disagreement with the political and/or economic system, this does not amount to persecution unless there is no right to change the government. Where past persecution is established, there is a rebuttal presumption that the alien has reason to fear persecution in the future. The

presumption may be rebutted if a preponderance of evidence shows that conditions are changed so much that there is little likelihood of present persecution. An alien who establishes past persecution but not a well-founded fear of persecution will be denied asylum unless based on humanitarian discretion when there are compelling reasons for not returning him which arise out of the severity of the past persecution. Withholding of removal like asylum requires a showing that the alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. An alien seeking this relief has a stricter burden to show that it is more likely than not that he would be subjected to persecution on one of the enumerated asylum grounds. Similarly, for withholding of removal under the Convention Against Torture an alien must show that it is more likely than not that he would be subjected to torture, although such torture need not be on account of an enumerated asylum basis. Torture is, however, defined as an extreme form of cruel and inhuman treatment inflicted on the victim while in the custody or control of a perpetrator who's

either a public official or the agent of a public official through consent or acquiescence of the official. Treatment must be calculated to inflict and does cause pain and suffering to the victim. It does not, however, include the application of lawful sanctions against, law breakers or when used to further law enforcement so long as such sanctions are in conformity with international legal standards. Also, with respect to protection under the Convention Against Torture, it has been held that mass human rights violation in the country without more does not prove that a particular alien or person will be subjected to torture. Protection does not extend to persons who fear entities that a government is unable to control. *Matter of S-V-*, Int. Dec. 3430 (BIA May 9, 2000). If the respondent fails to satisfy the lower burden of proof required for asylum, it necessarily follows that he cannot satisfy the clear probability standard of eligibility for withholding of removal. The respondent must show that his fear is subjectively genuine and objectively reasonable. The subjective mental state must be considered against the background of circumstances prevailing in the alien's home country. The

objective reasonableness of the alien's fear can be based on what has happened to others similarly situated as reported in the current Country Report or other reliable sources such as newspaper articles and country reports from such human rights and international organizations. In some cases, the only available evidence of the alien's subjective fears is his own testimony. This may suffice if that testimony is credible, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the alien's fears. However, this does not mean that introducing supporting evidence is at the alien's option. Generally, such evidence must be presented when available. An asylum applicant shall provide documentation of easily verifiable circumstances which are the basis of his claim and it they are not provided, the applicant should provide a plausible explanation for its unavailability. Where it is reasonable to expect corroborating evidence to be available and the alien provides no plausible reason for its absence, his testimony alone is insufficient. Indications of credible testimony are consistency on direct and cross-examination, consistency with the written application,

and the absence of embellishment. Testimony is not, however, considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable. Cases in which the testimony of the witness is weak require greater emphasis on the presentation of corroborating evidence.

Based on respondent's I-589, he fears that if he returns to Albania, he and his family will be jailed or killed by the Socialist Party Supporters and members based on his support for the Democratic Party. Specifically, because of his political support for the Democratic Party, the Socialist Party has caused his businesses to be destroyed and him to be jailed without charges. In January 1991 he was jailed for three weeks for participating in a pro-democratic protest. Between July and December 1997 respondent was twice taken to the police station. In March 1999 he was jailed for 12 days for arguing with the Socialist Party chairman for Shkoder. From 1990 until the time that he left Albania, respondent supported the Democratic Party, encouraging others to join. Respondent also bases his fear of persecution on the historical persecution

that his family was subjected to under Communist rule for their pro-democracy beliefs. For example, his father was jailed from 1979 to 1987. Respondent's grandfather was executed by a Communist in 1954. And respondent himself was jailed, tortured and beaten in 1989 under Communist rule. Respondent became a business man in June of 1991 when he opened a small coffee shop. In 1993 he bought a small bread factory. March 1997 respondent defended against criminal gangs who broke out of jails and who were urged to engage in destruction of main institutions. As a consequence, respondent's bread factory wad destroyed. After June 1997 former Communists came to power through a fraudulent election. Police beat and threatened, raided respondent's bread shop causing serious damage for his participation in protests against this fraudulent election. In May of 1998 Shkoder police chief, a Socialist Party member, provoked and offended respondent, and detained and mistreated him or two days when respondent reacted to the provocation. September 1998 respondent was assaulted by police at a checkpoint while he was returning from the funeral of a democratic party

official. Police fired shots at his feet. The last incidents which occurred happened in March and April1999 when the chairman of the Socialist Party of Shkoder threatened respondent and his family, mistreated his wife, searched respondent's home for weapons, arrested and detained him for 12 days without charges. Upon respondent's releases he confronted this Socialist Party chairman threatening to contact the press about his abuse of authority. The chairman returned the threat, and an April 8, 1999 respondent's apartment was bombed. Respondent testified today that he believed the chairman ordered the bombing based on his verbal threat which occurred a few days before the bombing. However, the only corroborative evidence respondent produced was from the chairman of the association of politically persecuted persons which states that while the bombing occurred, it was a criminal act and the assailants were unidentified. See Exhibit 2, tab 7.

Because respondent has made such sweeping claims of persecution which on their own do not amount to persecution based on Board precedent that Albania is gripped

by civil strife and chaos, police brutality, affecting the general population, the court would expect respondent to provide more than his own testimony about these broad allegations. For example, he testified that his bread factory was bombed, and the security guard was seriously injured, while acknowledging in his testimony that the security could have corroborated the event, respondent still nonetheless failed to provide a reason why he did not present such corroborative proof. And despite that the Court finds respondent credible based on the consistency between the testimony and his I-589 statements, he's nonetheless failed to show past persecution or a well-founded fear of persecution or eligibility for relief under the Convention Against Torture based on the underlying events of his claim which amount to civil strife that affects the general population of Albania. And, furthermore, he's been contradicted by the Country Reports which show there are no clear cases of detainees held for political reasons except with the possibility of leaders of the Democratic Party, respondent hasn't demonstrated that he was a leader in the Democratic Party. Furthermore, respondent's

testimony and I-589 demonstrate that he is in disagreement with the current Socialist Party ruled government as a democrat party member. However, the Country Reports for Albania for 1999 show that Albania is a republic with multi-party parliament, a prime minister and a president elected by the parliament. The 1997 elections were deemed to be acceptable and satisfactory under the circumstances, and even in the international community such observers considered the 1997 elections to be satisfactory. This contradicts respondent's testimony that the elections were ripe with fraud. The Country Reports further state the constitution states the government is based on a system of elections that are free, equal, general and periodic. The Country Reports further state that peaceful assembly is allowed not only in the law but in practice. And while requiring groups to obtain permission, the government has made no concerted efforts to prevent peaceful assembly. Therefore, respondent's claim of past persecution based on his arrests for engaging in protest which span the Communist era to the democratic era to the socialist era, have been rebutted by changed country

conditions based on the 1999 Country Reports on Human Rights Practices for Albania and, therefore, respondent has no well-founded fear. Also, respondent's claim that he would be persecuted by Communists or neo-Communists who he's identified as the socialists in power, is contradicted by the profile of Asylum Claims which state applicants frequently and incorrectly seek to portray the socialist government as Communist. Exhibit 3, tab C. In fact, the Communists have been out of power since 1990 when they were forced to resign in 1991 and then replaced by a caretaker cabinet and then replacd by the democratic party. And according to the profile of Asylum Claims those parliamentary elections were marred by fraud, intimidation and tampering. The same accusations that respondent now makes against the socialist regime. And therefore, based on Board precedent while this is all, politics, it is not persecution as long as respondent can still vote.

The Country Reports further talk about the widespread police corruption and criminal gang activity which was widely featured in respondent's complaint today. However, these are circumstances that the general population in Albania

are subject to, and the Country Reports further show that the government does not condone the police brutality but instead has supported some international efforts to try to train the police, and that such brutality is a result of the lack of training of the police. Exhibit 3, tab B. The 1999 Country Reports on Human Rights practices further state that the police waged major operations in the district of Shkoder among others, where criminal gangs were active and although serious problems in the area of policing remain, it is a result of the country's endemic corruption. Therefore, respondent has not shown eligibility for relief under Convention Against Torture. And despite that there remains human rights abuses in that country, respondent has not demonstrated how he was singled out from the general population to be subjected to such anarchy and chaos. Based on the foregoing, the Court denies respondents' request for relief. The following orders will be entered:

ORDER

IT IS HEREBY ORDERED that respondents' request for asylum, withholding of removal to Albania and under Convention Against Torture be denied.

IT IS FURTHER ORDERED that respondents be removed to Albania on the charges in the Notices to Appear.

October 3, 2000

unsigned
MIRIAM K. MILLS
U.S. Immigration Judge